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95-1154

Supreme Court
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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DALKON SHIELD CLAIMANTS TRUST,

Petitioner,

v.

SUSAN SHADBURNE-VINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether a statute that purports retroactively to repeal a statute of repose, for the express purpose of reviving causes of action that have already been extinguished by the prior statute of repose, violates the Due Process Clause under the controlling authority of *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925)

Parties

The plaintiff/appellant below was Susan Shadburne-Vinton, n/k/a Susan Shadburne.

The defendant/appellee below was the Dalkon Shield Claimants Trust.

The following parties filed briefs as amicus curiae in the court below:

American Insurance Association;
Oregon Trial Lawyers Association; and
Pharmaceutical Research and Manufacturers of America.

Pursuant to Rule 29.6, the Dalkon Shield Claimants Trust states that it is not a corporation and further that it has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner respectfully asks that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 60 F.3d 1071 (4th Cir. 1995). The opinion of the United States District Court for the District of Maryland is reported at 851 F. Supp. 712 (D. Md. 1994). The foregoing opinions and the Court of Appeals order denying rehearing are contained in the Appendix to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on July 26, 1995. Petitioner timely filed a petition for rehearing in that Court on August 9, 1995. That Court denied the petition for rehearing on October 19, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(b) may apply. To petitioner's knowledge, neither the District Court nor the Court of Appeals certified to the Attorney General of Oregon the fact that the constitutionality of a statute of Oregon was drawn into question. This petition for writ of certiorari is being served on the Attorney General of Oregon contemporaneous with its service upon all parties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that "No State shall [deprive] any person of life, liberty or property, without due process of law . . . . " This petition also involves ORS 30.905, Oregon Laws 1987 c.4 §§ 5-10, and Oregon Laws 1989 c.642 § 2. Those statutory provisions are contained in the Appendix.

STATEMENT

The issue presented in this petition concerns the constitutionality of the Oregon legislature's attempt to revive a claim that the products liability statute of repose had already extinguished by retroactively removing the product at issue from the repose statute's reach.

The Fourth Circuit majority opinion effectively acknowledged that two of this Court's cases, *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), and *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945), would require affirmance of the District Court's conclusion that the revival legislation violated Due Process. Over a dissent, however, the majority reversed, based on its perception that *Danzer* and *Chase* are "outdated and no longer valid" -- even though those decisions have never been overruled by this Court. 60 F.3d at 1076.

In addition to departing candidly from this Court's precedents, the Fourth Circuit majority opinion also conflicts with the federal Due Process decisions and analysis of the appellate courts of Maryland, North Carolina, Virginia, West Virginia and Wisconsin.

The Fourth Circuit majority opinion also conflicts with decisions from federal courts in the Eighth and Ninth Circuits, which have recognized the continuing validity of *Danzer* and *Chase*.

The legislative action at issue in this petition reflects an emerging trend of legislatures responding to the political pressure exerted by the personal injury plaintiffs' bar to enact revival statutes directed at the manufacturers of whatever product is the most recent topic of litigation publicity. Recent history in Oregon, the state involved in this case, is illustrative. The legislation here purports to revive time barred claims relating to use of an intrauterine device ("IUD"). Several years after that legislation was passed, the Oregon legislature revived products liability breast implant claims previously barred by the statute of repose. Later still, the Oregon legislature revived repose-barred products liability cases involving pick-up trucks with side-saddle gas tanks mounted outside the frame rail.

In light of this legislative trend, the Fourth Circuit's frank decision not to follow this Court's opinions in *Danzer* and *Chase*, and the irreconcilable inconsistency between the Fourth Circuit's opinion and the decisions of other state and federal appellate courts, this Court should grant this petition to settle the issue of whether a legislature can

constitutionally revive a claim that has been extinguished by a statute of repose.

BACKGROUND

Respondent Susan Shadburne alleges that she was injured by two Dalkon Shield IUDs, manufactured and sold by A.H. Robins Co., Inc. ("Robins"). The second of Shadburne's two Dalkon Shields was purchased and inserted in Oregon, her state of residence, on March 1, 1974. As of March 1, 1982, eight years after Shadburne obtained her second IUD, the Oregon statute of repose provided, in relevant part:

> [A] product liability civil action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption.

ORS 30.905(1). Shadburne did not file her suit until 1983. [1/]

1/ The procedural history of this case is outlined in the Fourth Circuit majority opinion. In short, Shadburne filed suit in 1983 in the United States District Court for the District of Maryland, invoking that Court's diversity jurisdiction under 28 U.S.C. § 1332. Her case was dismissed pursuant to the statute of repose in 1984. While the case was on appeal to the Fourth Circuit for the first time, Robins filed for bankruptcy. The Dalkon Shield Claimants Trust (the "Trust"), petitioner herein, was eventually substituted as the party defendant. Upon compliance with the procedures imposed by the bankruptcy court, Shadburne's case resumed in federal court in Maryland in 1992 after she had refused the Trust's offer of settlement. By that time, the Special IUD Statute had been passed. The District Court dismissed Shadburne's case on May 19, 1994,

Footnote continued on next page

In 1987, Oregon enacted a statute providing that the Oregon statute of repose would not bar product liability actions seeking damages for IUD-related injuries. Or. Laws 1987 c. 4 §§ 5-10. The Oregon Legislative Assembly renewed the effect of that statute in 1989. Or. Laws 1989 c. 642 § 2. (The 1987 and 1989 statutes are referred to herein as the "Special IUD Statute.") The Special IUD Statute was to apply retroactively, such that it would revive a claim even if the claim was previously extinguished by expiration of the statute of repose.

Ten years after the original eight-year statute of repose had extinguished her cause of action, Shadburne invoked the Special IUD Statute as a basis for sustaining her previously dismissed claim. The District Court once again dismissed Shadburne's claim because it found that the Special IUD Statute was unconstitutional under the Due Process Clause. A divided panel of the Fourth Circuit reversed.

REASONS FOR GRANTING THE PETITION

I. The Special IUD Statute is Unconstitutional Under this Court's Decisions in *Danzer* and *Chase*.

The Fourth Circuit refused to apply this Court's holding in *William Danzer Co. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633 (1925), that timeliness requirements that define the parties' substantive rights -- as opposed to timeliness requirements that merely regulate a party's access to the courts -- may not be retroactively enlarged. *Id.* at 636-37. In *Danzer*, the plaintiff filed suit on a cause of action created by a statute providing that suit must be

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Footnote continued from previous page

leading to the Fourth Circuit appeal to which this petition is directed.

brought within two years of injury. More than two years after the plaintiff suffered its injury and before the plaintiff had filed suit, Congress passed a new law, suspending the two-year period under certain circumstances. The plaintiff then sued, relying upon a retroactive application of the suspension to render its case timely.

This Court held for the defendant. Citing a series of authorities noting the substantive purpose of the original timeliness requirement in the statutory scheme at issue, the Court held that "[t]he lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. On the expiration of the two-year period, it was as if liability had never existed." 268 U.S. at 636.

As evidenced by the Court's discussion of *Campbell v. Holt*, 115 U.S. 620 (1885), *Danzer* clearly turned on the Court's conclusion that the timeliness requirement involved in *Danzer* -- as distinguished from conventional statutes of limitation -- was intended to extinguish the defendant's liability. In *Campbell v. Holt*, the Court permitted legislative revival of a claim barred by the expiration of an ordinary statute of limitations. That case however:

> belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability.

268 U.S. at 636-37. To permit revival of a claim extinguished by the latter kind of statute "would be to deprive the defendant of its property without due process of law in contravention of the Fifth Amendment." *Id.*

As the Fourth Circuit recognized in this case, *Danzer*'s holding was reaffirmed in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). In *Chase*, a Minnesota plaintiff brought a common law tort action, the timeliness of which was governed by the state's general

statute of limitations. While the suit was pending, the Minnesota legislature enacted a new statute of limitations which enlarged the limitations period and applied to claims that already were time-barred before the new statute was passed. Consistent with the distinction announced in *Danzer*, this Court applied the rule established in *Campbell v. Holt* that a state may enlarge a conventional statute of limitations even after the previous limitations period has expired, provided that the previous limitations period was not designed to define the parties' substantive rights. *See Chase*, 325 U.S. at 311-12.

The *Chase* decision specifically reaffirmed *Danzer*. The Court noted the absence of any suggestion that: a) Minnesota's applicable tort statute of limitations was designed to condition the plaintiff's right to bring her cause of action; or b) the expiration of the original time period was intended to terminate the underlying liability. This Court recognized that *Danzer* remained good law and would bar enlargement of a time period that would "confer on [the plaintiff] a new right or subject [the defendant] to a new liability" after the pre-existing right or liability had been extinguished. *See* 325 U.S. at 312, n.8.

The majority opinion of the Court of Appeals in this case acknowledged that statutes of repose are the kind of timeliness statute that fall within this Court's *Danzer/Chase* prohibition on revival of extinguished claims. Courts distinguish repose statutes from limitations statutes in various contexts including choice of law analysis where repose statutes are found to be a substantive part of the parties' rights while limitations statutes are found to be merely procedural. *See, e.g., Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1223 (10th Cir. 1991); *Boudreau v. Baughman*, 368 S.E.2d 849, 857 (N.C. 1988); *Goad v. Celotex*, 831 F.2d 508, 511 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). The statutes have also been distinguished in other contexts. *See, e.g., Langley v. Pierce*, 438 S.E.2d 242, 243-44 (S.C. 1993) (statute of repose not tolled by defendant's absence from state); *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 865-66

(4th Cir. 1989) (statute of repose not tolled by defendant's fraud), *cert. denied*, 493 U.S. 1070 (1990).

The same distinction applies in the specific context of the Oregon statute of repose. In *Pottratz v. Davis*, 588 F. Supp. 949 (D. Md. 1984), the court noted that when the timeliness statute "'bars the rights and not merely the remedy,'" the statute "'is considered substantive.' The statute, if conceived of as a grant of immunity from suit, is also considered to be substantive." 588 F. Supp. at 952 (citation omitted). The *Pottratz* court then concluded that the Oregon statute of repose "does not operate to bar a remedy; it prevents a cause of action from ever arising." *Id.*; *see also Walls v. General Motors, Inc.*, 906 F.2d 143, 146 (5th Cir. 1990) (Oregon statute of repose is substantive law).

The Oregon statute of repose is precisely the kind of substantive statute that was involved in *Danzer*. As with the timeliness provision in *Danzer*, "the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff." *Danzer*, 268 U.S. at 636; *compare Pottratz*, 588 F. Supp. at 953 (Oregon statute of repose "bars the right, not merely the remedy"); *see also Goad*, 831 F.2d at 511 ("When a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law."). The Oregon statute of repose is not directed at mere remedies such that *Chase* and *Campbell v. Holt* would permit its enlargement. Once the statute of repose extinguished Shadburne's cause of action, the Oregon legislature could not constitutionally revive it.

Pursuant to this Court's Rule 10.1(c), this Court should grant this petition for a writ of certiorari to correct the Fourth Circuit's resolution of the constitutionality of what is becoming an increasingly common form of special legislation with regard to currently unpopular products.

II. The Fourth Circuit majority conflicts with the opinions of numerous state appellate courts.

Numerous state appellate courts have held that *Danzer* precludes retroactive enlargement of timeliness

provisions that are designed to extinguish liability. In *Colony Hill Condominium I Ass'n v. Colony Co.*, 320 S.E.2d 273 (N.C. App. 1984), *review denied*, 325 S.E.2d 485 (N.C. 1985), involving nearly identical facts, the court applied *Danzer* and held: "Once the [prior] statute of repose barred the plaintiffs' suit, however, a subsequent statute could not revive it." 320 S.E.2d at 276.

Similarly, in *School Bd. of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325 (Va. 1987), also under nearly identical facts, the plaintiff attempted to rely upon *Chase* and *Campbell v. Holt* for the proposition that a legislature can enlarge a repose period after the prior repose period expires. The Virginia Supreme Court explicitly rejected this reliance, holding that *Chase* and *Campbell v. Holt* were mere statute of limitations cases, having no application to the very different situation presented by a statute of repose. 360 S.E.2d at 327-28.[2/]

The same federal constitutional issue has arisen in the context of revival of claims that had been extinguished by the timeliness requirement of wrongful death statutes. These timeliness requirements, like statutes of repose, are considered part of the parties' substantive rights. The high courts of Maryland and Wisconsin have held that *Danzer* precludes retroactive enlargement of these timeliness provisions. *See Smith v. Westinghouse Elec. Corp.*, 291 A.2d 452, 455 (Md. 1972); *Haase v. Sawicki*, 121 N.W.2d 876, 881 (Wis. 1963); *see also Lester v. State Workmen's Compensation Comm.*, 242 S.E.2d 443, 452 n.15 (W. Va. 1978) (under *Danzer*, the legislature "may not extend a period of limitation after it has expired where the limitation period is part of the substantive right").

2/ Although the court's ultimate holding was based on the Due Process Clause of the Virginia Constitution, it relied on *Chase* and *Campbell v. Holt* in a manner inconsistent with the Fourth Circuit majority opinion.

The Fourth Circuit majority opinion cannot be reconciled with the federal Due Process analysis and holdings of each of these state appellate courts. Pursuant to this Court's Rule 10.1(a), this conflict between the decision of the Fourth Circuit and the state courts of last resort is an additional reason for granting this petition for a writ of certiorari.[3]

III. The Fourth Circuit majority conflicts with the opinions of other federal courts.

In addition to the state court decisions cited *supra*, other federal courts have recognized the continuing vitality of the *Danzer/Chase* rule. In *In re Alodex Corp. Sec. Litig.*, 392 F. Supp. 672 (S.D. Iowa 1975), *aff'd*, 533 F.2d 372 (8th Cir. 1976), after a lengthy examination of *Danzer* and *Chase*, the court held that *Danzer* prohibits retroactive enlargement of the time to sue under the Iowa Blue Sky Law. *Id.* at 681. The Eighth Circuit "affirm[ed] on the basis of the well-reasoned District Court opinion." 533 F.2d at 374; *see also Davis v. Valley Distrib. Co.*, 522 F.2d 827, 830 n.7 (9th Cir. 1975) (*Campbell v. Holt* rule did not apply in *Danzer* because "Congress had intended the expiration of the limitations period to put an end to the existence of the liability itself, not to the remedy alone"), *cert. denied*, 429 U.S. 1090 (1977); *Starks v. S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982) (*Chase* "distinguished *Danzer* on

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3/ It should be noted that, as a matter of state constitutional law, many states have held that even a conventional statute of limitations may not be enlarged after it has expired as to particular claim. *See Waller v. Pittsburgh Corning Co.*, 742 F. Supp. 581, 583-84 (D. Kan. 1990) (collecting cases), *aff'd*, 946 F.2d 1514 (10th Cir. 1991).

the grounds that Congress had intended the expiration period to put an end to the liability itself, not to the remedy alone").

These federal decisions are inconsistent with the Fourth Circuit majority's determination that the *Danzer/Chase* rule is no longer good law. Pursuant to this Court's Rule 10.1(a), this conflict between the decision of the Fourth Circuit and other lower federal courts is an additional reason for granting this petition for a writ of certiorari.[4/]

IV. The Fourth Circuit majority erred when it concluded that the *Danzer/Chase* rule is "outdated and no longer valid."

The Fourth Circuit majority acknowledged the *Danzer/Chase* rule set forth above. The court also acknowledged the distinction between statutes of repose and statutes of limitation. The court concluded, however, that subsequent decisions from this Court render the *Danzer/Chase* rule "outdated and no longer valid." As set

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4/ The conflict among the lower federal courts is further highlighted by *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), which upheld a statute in the asbestos context similar to the statute upheld by the Fourth Circuit here. *Wesley*, however, simply did not cite *Danzer*. In addition, *Wesley* rejected the well-recognized distinction between statutes of repose and statutes of limitations, which the D.C. Circuit dismissed as being too "metaphysical." See 876 F.2d at 122. The District Court in *Wesley*, like the District Court here, had correctly recognized that the revival legislation was constitutionally infirm.

forth herein, this conclusion rests on an erroneous interpretation of this Court's subsequent precedents. In any event, it is not the task of the Courts of Appeals to decide that clear decisions of this Court have been overruled *sub silentio*. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

A. The Cases Cited by the Fourth Circuit Majority Do Not Involve a Legislature's Power to Divest a Grant of Immunity.

To support its view that the *Danzer/Chase* rule is "outdated and no longer valid," the Fourth Circuit majority relied primarily upon *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case, this Court upheld a congressional occupational disease compensation scheme pursuant to which coal mine operators could be required to compensate miners who had already concluded their employment at the time that the statute was passed. The operators acknowledged "Congress' power to create a program for compensation of disabled inactive coal miners," *id.* at 15, as well as "Congress' power to impose the burden of past mine working conditions on the industry." *Id.* at 18. They argued, however, that the statute was unconstitutional because if Congress had properly analyzed the economics of the coal industry, it would have spread the cost of compensation among all current operators rather than imposing that cost upon the individual operator in whose mine a given retired miner had worked. *Id.* at 18.

Critically, the operators did not -- and could not -- argue that the retroactive imposition of liability upon them stripped them of a legislative grant of immunity. There was nothing in the law prior to passage of the statute that conferred such immunity. *Turner Elkhorn* merely upheld the

well-established proposition that the Constitution does not authorize the Court to adjudicate the wisdom of Congress' selection of guiding economic principles. The case did not address the *Danzer/Chase* issue of whether the legislature, having once granted immunity through a statute of repose, can retroactively take it away.

The Fourth Circuit majority also relied upon *Pension Benefits Guaranty Corp. v. Gray*, 467 U.S. 717 (1984). The statute at issue in that case retroactively imposed "withdrawal liability" upon employers withdrawing from multiemployer pension plans governed by ERISA. Upholding the statute, the Court noted the "strong deference accorded legislation in the field of national economic policy." *See* 467 U.S. at 729; *see also id.* at 731 (noting "limited judicial review accorded economic legislation under the Fifth Amendment"). As in *Turner Elkhorn*, the Court in *Gray* was not presented with the issue of whether the legislature could strip a party of a grant of immunity.

General Motors Corp. v. Romein, 112 S. Ct. 1105 (1992), the final case upon which the majority relied, involved a provision of Michigan's worker's compensation statute requiring recalculation of benefits that had already been paid. The Court noted the economic nature of the legislation and held that the statute did not violate Due Process. *See* 112 S. Ct. at 1112. Again, the Court was not confronted with the legislative removal of a prior grant of immunity.

The Fourth Circuit majority's conclusion that the foregoing cases render the *Danzer/Chase* rule "outdated and no longer valid" also cannot be reconciled with this Court's decision in *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), decided five months **after** *Turner Elkhorn* case relied upon so heavily by the majority. In that case, Congress had enlarged retroactively the statute of limitations for filing discrimination claims with the EEOC. The defendant challenged the enlargement with an "unwarrantedly broad reading" of *Danzer*. *See* 426 U.S. at 243. This Court cited *Chase*'s holding that "lifting the bar of a statute of limitation

so as to restore a remedy lost through mere lapse of time" is permissible under the Due Process Clause. *Id.* at 243-44 (emphasis added). If *Turner Elkhorn* had overruled the *Danzer/Chase* distinction between remedial and substantive time bars for purposes of constitutional analysis, this Court would not have applied that rule in a decision issued several months after *Turner Elkhorn*. As the Fourth Circuit dissent and the District Court noted, "*Robbins & Myers* [is] testament to [*Danzer*'s] continued vitality, since the opinion in [that case] distinguished [itself] from the substantive impairment found in *Danzer*." *See* 60 F.3d at 1079.

B. The *Danzer/Chase* Rule Has Always Coexisted With the Rule Underlying the Cases Relied Upon by the Fourth Circuit Majority.

Contrary to the Fourth Circuit majority's interpretation, the three cases that supposedly altered the *Danzer/Chase* rule in fact applied a general rule of law applicable to retroactive economic legislation that had existed at the time that both *Danzer* and *Chase* were decided. To support the very proposition in *Turner Elkhorn* quoted and relied upon by the majority, 60 F.3d at 1075, this Court had cited a series of cases dating from 1911 through 1947, a time span that includes the years in which *Danzer* (1925) and *Chase* (1945) were decided. In *Gray*, also heavily relied upon by the Fourth Circuit majority, the Court referred to the standard applied to the constitutional analysis of retroactive legislation in the 1938 case of *Welch v. Henry*, 305 U.S. 134 (1938), and held: "that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*." 467 U.S. at 733. The general principles governing the constitutionality of retroactive legislation have not changed since the decisions in *Danzer* and *Chase*.

Rather than being an "outdated and no longer valid" mode of analysis, the *Danzer/Chase* rule reflects the special analysis that this Court has always applied to the unique Due Process problem posed by enlargement of an expired time

bar. That rule has never been governed by the Court's jurisprudence governing retroactive legislation in general. The *Danzer/Chase* rule does not rest on the principle that legislation cannot be applied retroactively; it rests on the principle that once immunity has been granted, liability cannot be revived. That principle is still good law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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